No. 92-8556

In the Supreme Court of the United States

OCTOBER TERM, 1993

KENNETH O. NICHOLS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

MICHAEL R. DREEBEN
Assistant to the Solicitor General

THOMAS E. BOOTH
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

45 pp

QUESTION PRESENTED

Whether it violated the Constitution for the sentencing court to consider petitioner's prior uncounseled misdemeanor conviction in determining his criminal history score under the Sentencing Guidelines.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued:

Cases—Continued:

Cases—Continued: Page

Constitution, statutes and rules:

Rules—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-8556

KENNETH O. NICHOLS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals, J.A. 23-53, is reported at 979 F.2d 402. The district court's opinion on sentencing, J.A. 8-16, is reported at 763 F. Supp. 277.

JURISDICTION

The judgment of the court of appeals was entered on November 6, 1992. A petition for rehearing was denied on February 16, 1993. J.A. 54. The petition for a writ of certiorari was filed on April 23, 1993, and granted on September 28, 1993, limited to the first question presented by the petition. J.A. 55. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. In 1990, petitioner entered a plea of guilty in the United States District Court for the Eastern District of Tennessee to the charge of conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846. J.A. 5-7, 25-26. Petitioner was sentenced pursuant to the Sentencing Guidelines. In computing petitioner's criminal history score under the Guidelines, the presentence report assessed petitioner a total of four criminal history points. C.A. Joint Appendix 43; Sentencing Guidelines § 4A1.1.

Three criminal history points were assessed for petitioner's 1983 conviction of a felony drug offense in violation of federal law. C.A. Joint Appendix 36; Guidelines § 4A1.1(a). One criminal history point was assessed for petitioner's 1983 conviction of the misdemeanor of driving under the influence of alcohol (DUI) in violation of Georgia law.[1] C.A. Joint Appendix 37; Guidelines § 4A1.1(c). As to petitioner's misdemeanor offense, the presentence report indicated that petitioner pleaded nolo contendere in municipal court in Canton, Georgia, and was sentenced to pay a $250 fine and to attend DUI school. The report noted that the court record did not indicate whether petitioner was represented by counsel, but petitioner informed the probation officer that he had contacted an attorney, who informed him that

[1] See Ga. Code Ann. § 40-6-391 (Michie 1991). Pursuant to the version of that provision in effect at the time of petitioner's conviction, a person convicted of driving under the influence of alcohol "shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by imprisonment for not less than ten days nor more than one year, or by a fine of not less than $100.00 nor more than $1,000.00, or by both such fine and imprisonment." Pet. Br. 4 n.1, quoting Ga. Code Ann. § 40.6-391(c).

counsel was unnecessary as he was pleading nolo contendere.[2] C.A. Joint Appendix 37.

Petitioner's four criminal history points placed him in Criminal History Category III.[3] When combined with his offense level of 34, petitioner's criminal history resulted in a Guidelines sentencing range of 188 to 235 months' imprisonment. C.A. Joint Appendix 48-50; Sentencing Guidelines, Ch. 5, Pt. A (Sentencing Table).[4]

At sentencing, petitioner objected to the inclusion of his DUI misdemeanor conviction in his criminal history score on the ground that he lacked counsel in that proceeding and that the record did not indicate a

[2] The report stated that "[n]o information was available from the Court record as to whether the defendant was represented by an attorney. When Mr. Nichols was asked about this case, he indicated that he had contacted an attorney and had been informed by that attorney that he did not need to be represented at the hearing, since he would be pleading nolo contendere." C.A. Joint Appendix 37.

[3] There are six criminal history categories under the Sentencing Guidelines. A defendant's criminal history category is determined by the number of his criminal history points, which in turn is based on his prior criminal record. For example, zero or one criminal history points results in Criminal History Category I, two or three criminal history points results in Criminal History Category II, and four to six criminal history points results in Criminal History Category III. Sentencing Guidelines, Ch. 5, Pt. A (Sentencing Table).

[4] The Sentencing Table provides a matrix of sentencing ranges. The defendant's offense level is reflected on the vertical axis of the matrix; the defendant's criminal history category is reflected on the horizontal axis. The sentencing range is determined by identifying the intersection of the defendant's offense level and his criminal history category. In general, the range of authorized imprisonment escalates with each increase in the defendant's criminal history category.

waiver of counsel. He maintained that to consider that uncounseled misdemeanor conviction in establishing his Guidelines sentence would violate his Sixth Amendment rights under *Baldasar* v. *Illinois*, 446 U.S. 222 (1980). C.A. Joint Appendix 70-76. If petitioner's uncounseled misdemeanor conviction had been excluded from his criminal history score, he would have had three criminal history points, which would have placed him in Criminal History Category II. In that event, his Guidelines sentencing range would have been 168 to 210 months' imprisonment. Sentencing Guidelines, Ch. 5, Pt. A (Sentencing Table).

The district court rejected petitioner's contention. It noted that although there was no dispute that petitioner's misdemeanor conviction was uncounseled, "[t]he proof is unclear as to whether he may have validly waived his right to counsel." J.A. 9-10. The court then determined "on the basis of the facts before it" that petitioner had not waived his right to counsel in his DUI case, because "[s]uch a waiver must be intelligently and understandingly made, and cannot be presumed from a silent record." J.A. 10, citing *Boyd* v. *Dutton*, 405 U.S. 1 (1972) (per curiam). Nevertheless, the district court held that *Baldasar* did not bar the inclusion of petitioner's uncounseled DUI misdemeanor conviction in his criminal history score. J.A. 9-13. The court explained that, in view of the absence of a majority opinion in *Baldasar*, the case should be read narrowly to "stand[] only for the proposition that a prior uncounseled misdemeanor conviction may not be used to create a felony with a prison term." J.A. 12. Accordingly, the court found that petitioner's constitutional rights were not violated by using his 1983

DUI conviction to enhance his sentence.[5] J.A. 13. The court then sentenced petitioner to 235 months' imprisonment, the top of the applicable Guidelines range. J.A. 16.

2. The court of appeals affirmed. J.A. 23-53. By a 2-1 vote, the court held that the inclusion of petitioner's uncounseled misdemeanor conviction in computing his criminal history score did not violate *Baldasar*.[6] J.A. 46-53. After examining the three concurring opinions of the five Justices who formed the majority in *Baldasar*, and the opinions of other courts of appeals that had considered the issue, the court held that *Baldasar* imposes a limitation on the use of a prior uncounseled misdemeanor conviction in sentencing for a later offense only when the effect of considering the uncounseled conviction is to convert a misdemeanor into a felony. J.A. 50-52.

Judge Jones dissented from that holding. In his view, *Baldasar* bars any consideration of a defendant's prior uncounseled misdemeanor conviction to enhance a term of imprisonment for a subsequent offense. J.A. 26-32.

---

[5] Petitioner's offense of conviction in this case was already a felony, punishable under the statute by not less than ten years' imprisonment and not more than life imprisonment. See 21 U.S.C. 841(b)(1)(B); C.A. Joint Appendix 43, 52.

[6] The court of appeals accepted the district court's conclusion that petitioner did not validly waive counsel at his misdemeanor trial "as a legal matter," but expressed misgivings about its factual accuracy. J.A. 47 n.1. "In point of fact," the court stated, petitioner "may well have waived his right to counsel in the DUI processing." *Ibid.*

SUMMARY OF ARGUMENT

I. The Sentencing Guidelines calibrate a defendant's sentencing range in light of his criminal history, an approach that parallels recidivist sentencing schemes in the 50 States. Under this Court's cases, a felony conviction in which the defendant was denied the assistance of counsel is constitutionally void and may not be used to enhance a sentence for a subsequent crime. There is less clarity, however, about whether a misdemeanor conviction in which the defendant lacked counsel, and did not validly waive counsel, may be used to enhance a subsequent sentence.

When a misdemeanor conviction results in imprisonment, the Constitution requires that an indigent defendant be afforded appointed counsel absent a valid waiver. In *Scott* v. *Illinois*, 440 U.S. 367 (1979), however, the Court held that when a misdemeanor conviction does not result in actual imprisonment, the Constitution does not require that an indigent defendant be offered appointed counsel.

In *Baldasar* v. *Illinois*, 446 U.S. 222 (1980), the issue was whether an uncounseled misdemeanor conviction that did not result in imprisonment may be used to enhance a subsequent misdemeanor offense to a felony for which the defendant is sentenced to a prison term. By a 5-4 vote, the Court held that the Constitution did not permit that result, but no common rationale can be gleaned from the concurrences in that case. In the years since *Baldasar*, state and federal courts have struggled unsuccessfully to interpret that case and to apply it to other sentencing issues involving uncounseled misdemeanors.

It is possible to distinguish this case from *Baldasar* on several grounds: the effect of the prior uncounseled conviction in *Baldasar* was to convert a misdemeanor to a felony, while in this case the effect

of the misdemeanor was merely to alter the criminal history category (and thus increase the Guidelines sentencing range) for an offense that was already a felony. Moreover, the sentencing range for Baldasar's offense was much higher after the offense was enhanced by the prior, uncounseled misdemeanor conviction, whereas the sentencing range for petitioner's offense, after enhancement, was only marginally higher than the pre-enhancement range. And because there is no common rationale among the concurring opinions that made up the *Baldasar* majority, the precedential effect of that decision can reasonably be construed as limited to the unusual facts of the case.

To distinguish *Baldasar* on grounds such as these, however, would leave the law on this issue in a unsatisfactory state. Thus, we submit that the time has come to reconsider *Baldasar*. In barring the consideration of a constitutionally valid misdemeanor conviction in at least some sentencing contexts, *Baldasar* reached a result that cannot be reconciled with this Court's jurisprudence concerning sentencing procedure, with the premises of *Scott* v. *Illinois*, or with a proper interpretation of the Sixth Amendment. Because *Baldasar* reflects an incorrect application of sentencing principles and undercuts important policies in sentencing repeat offenders, that decision should be overruled.

II. Even if the Court were to hold that *Baldasar* bars the use of some uncounseled misdemeanors for sentence enhancement purposes, it would not require exclusion of petitioner's misdemeanor conviction. In *Johnson* v. *Zerbst*, 304 U.S. 458, 467-469 (1938), the Court held that a defendant who makes a collateral attack on an uncounseled conviction must show, by a preponderance of the evidence, that he did not "competently and intelligently" waive counsel. That rule

governs petitioner's collateral claim that his prior misdemeanor conviction may not be considered in this case because it was uncounseled.

Petitioner did not carry his burden to establish the absence of a valid waiver of counsel in his DUI case. He introduced no evidence that points to the absence of a waiver, and there is much that suggests that one occurred. Georgia law requires representation by counsel, or a valid waiver, in a misdemeanor case in which imprisonment is authorized. In light of the presumption of regularity accorded to state court proceedings, there is no basis for concluding that petitioner's decision to proceed without counsel was not the product of a valid waiver.

ARGUMENT

THE DISTRICT COURT PROPERLY CONSIDERED PETITIONER'S PRIOR UNCOUNSELED MISDEMEANOR CONVICTION IN DETERMINING HIS GUIDELINES SENTENCE

I. A CONSTITUTIONALLY VALID MISDEMEANOR CONVICTION MAY BE CONSIDERED IN A SUBSEQUENT SENTENCING PROCEEDING

When a defendant's prior conviction is constitutionally void because he was denied the assistance of counsel, this Court's cases hold that it may not be used to enhance his sentence for a subsequent crime. The corollary of that principle is that when a conviction is constitutionally valid despite the absence of counsel, as is the case with misdemeanors for which the defendant was not imprisoned, the conviction may properly be taken into account in a later sentencing proceeding.

A. A Valid Prior Conviction Is A Significant Consideration In Sentencing

Congress and the 50 States have long imposed enhanced penalties when a defendant has a prior criminal record. *Parke* v. *Raley*, 113 S. Ct. 517, 521-522 (1992); *Spencer* v. *Texas*, 385 U.S. 554, 559 (1967). The Sentencing Guidelines incorporate that principle as an integral element of federal sentencing; the more serious the defendant's prior record, the longer the sentencing range for his current offense. See Sentencing Guidelines, Ch. 5, Pt. A (Sentencing Table); note 4, *supra*.

In *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), the Court held that, in a felony case, the Constitution requires that an indigent defendant be offered appointed counsel unless that right is intelligently and competently waived. Subsequently, the Court considered whether a conviction that is invalid under *Gideon* can be used in a recidivist sentencing proceeding. The Court held that such a conviction may not be used "either to support guilt or enhance punishment for another offense," *Burgett* v. *Texas*, 389 U.S. 109, 115 (1967), and that a subsequent sentence that may have been based in part on such a prior invalid conviction must be set aside, *United States* v. *Tucker*, 404 U.S. 443, 447-449 (1972). See also *Loper* v. *Beto*, 405 U.S. 473 (1972) (conviction that is invalid under *Gideon* cannot be used to impeach the defendant's credibility in determining guilt in a subsequent trial).

In *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972), the Court considered whether to extend the rule of *Gideon* to misdemeanors. In *Argersinger*, the defendant was sentenced to serve 90 days in jail for the misdemeanor of carrying a concealed weapon. Although the defendant was indigent, the State had not offered him court-

appointed counsel. *Id.* at 26-27. This Court held that the denial of counsel in that case violated the defendant's Sixth Amendment rights: "[A]bsent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." *Id.* at 37.

In *Scott* v. *Illinois*, 440 U.S. 367 (1979), however, the Court held that the Sixth Amendment does not require appointed counsel for an indigent defendant in a misdemeanor case if his sentence does not result in actual imprisonment. The Court read *Argersinger* as restricting the right to appointed counsel in misdemeanor cases to prosecutions involving actual imprisonment, 440 U.S. at 372, because of *Argersinger*'s "conclusion that incarceration was so severe a sanction." *Scott*, 440 U.S. at 372-373. The Court also explained that

> [e]ven were the matter *res nova*, we believe that the central premise of *Argersinger*—that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment—is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel. *Argersinger* has proved reasonably workable, whereas any extension would create confusion and impose unpredictable, but necessarily substantial, costs on 50 quite diverse States.

440 U.S. at 373.

B. The Question Whether Prior Uncounseled Misdemeanors May Be Considered In Sentencing Was Not Conclusively Resolved By *Baldasar* v. *Illinois*

1. One Term after *Scott*, this Court addressed the question whether a prior uncounseled misdemeanor conviction that is valid under *Scott* may be used by a State to enhance a subsequent offense from a misdemeanor to a felony. In *Baldasar* v. *Illinois*, 446 U.S. 222 (1980), the defendant had been convicted of misdemeanor theft in 1975 at a trial in which he did not have counsel and did not formally waive any right to counsel. Baldasar was fined $159 and placed on probation for one year, but he was not imprisoned. Later that year, he was charged with a second theft offense for stealing a $29 shower head from a department store. Under Illinois law, Baldasar's first offense of theft of property worth less than $150 was a misdemeanor punishable by up to one year's imprisonment, but a second conviction for the same offense could be treated as a felony punishable by one to three years' imprisonment. Baldasar was convicted of the second theft and was sentenced to prison for one to three years. The state courts rejected the claim that his prior uncounseled misdemeanor conviction could not be used to impose an enhanced prison term. *Id.* at 223. By a 5-4 vote, this Court reversed. *Id.* at 224.

The per curiam opinion in *Baldasar* provided no rationale for the result; instead, it referred to the "reasons stated in the concurring opinions." *Baldasar*, 446 U.S. at 224. Three such concurrences were filed. Justice Stewart, joined by Justices Brennan and Stevens, filed a brief concurrence that relied entirely on *Scott*. Justice Stewart stated simply that the defendant "was sentenced to an increased term of imprisonment *only* because he had been convicted in a previous prosecution in which he had *not* had the assistance of appointed counsel in his defense," and that "this prison sentence violated the constitutional rule of *Scott* v. *Illinois*, *supra*." *Baldasar*, 446 U.S. at 224.

Justice Marshall, with whom Justices Brennan and Stevens also joined, explained his views at greater length. 446 U.S. at 224-229. His concurrence stated that "a conviction which is invalid for purposes of imposing a sentence of imprisonment for the offense itself remains invalid for purposes of increasing a term of imprisonment for a subsequent conviction under a repeat-offender statute." 446 U.S. at 228. Justice Marshall acknowledged that "the increased prison sentence in this case is not an enlargement of the sentence for the original offense," *id.* at 227, and that counsel was not required for the prior misdemeanor "if one accepts the line drawn in *Scott*." 446 U.S. at 225. In his view, however, the uncounseled misdemeanor conviction was "not sufficiently reliable" to support imprisonment for that offense under *Argersinger*, and it "does not become more reliable merely because the accused has been validly convicted of a subsequent offense." 446 U.S. at 227-228.

Justice Blackmun, who provided the fifth vote for reversal, concurred on a quite different basis. 446 U.S. at 229-230. Quoting from his dissent in *Scott*, Justice Blackmun advanced a constitutional rule that would require the appointment of counsel for an indigent defendant whenever he is charged with a "non-petty" offense (*i.e.*, an offense punishable by more than six months' imprisonment) or when the defendant, upon conviction, is actually sentenced to imprisonment. 446 U.S. at 229. Because Baldasar's prior misdemeanor offense had been punishable by more than six months, Justice Blackmun believed that under his test, Baldasar was entitled to counsel in his first misdemeanor proceeding and that the absence of counsel rendered that conviction invalid. *Id.* at 230. Justice Blackmun concluded that because it was invalid, the conviction could not be used to support enhancement. *Ibid.*

In dissent, Justice Powell, joined by Chief Justice Burger, Justice White, and then-Justice Rehnquist, reasoned that Baldasar was being imprisoned for his second offense, not for an uncounseled first offense, and that a "valid misdemeanor conviction * * * should be available to enhance petitioner's sentence." 446 U.S. at 233. Justice Powell stated that in holding to the contrary, the Court ignored the constitutional validity of the prior misdemeanor conviction and created a special class of "hybrid" uncounseled misdemeanor convictions, "valid for the purposes of their own penalties," but "invalid for the purpose of enhancing punishment upon a subsequent misdemeanor conviction." *Id.* at 232. Justice Powell predicted that the Court's decision would "create confusion in local courts and impose greater burdens" on States. *Id.* at 234. "The result will be frustration of state policies of deterring recidivism by imposing enhanced penalties." *Id.* at 235.

2. The fragmentation of the Court in *Baldasar* has created difficulties in applying it to cases that differ from its distinctive facts: the use of a prior uncounseled misdemeanor conviction, for which the defendant was exposed to, but did not receive, a sentence of imprisonment, to enhance a subsequent misdemeanor offense to a felony with a mandatory prison term. Normally, when no opinion commands the support of a majority of the Justices, the holding of the Court is the position taken by "those Members who concurred in the judgment[] on the narrowest grounds." *Marks* v. *United States*, 430 U.S. 188, 193 (1977), quoting *Gregg* v. *Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell & Stevens, JJ.); *City of Lakewood* v. *Plain Dealer Publishing Co.*, 486 U.S. 750, 764 n.9 (1988). In *Baldasar*, however, that means of ascertaining the Court's

holding is not available, as the concurrences of Justices Stewart, Marshall and Blackmun do not reduce to a single "narrowest ground[]."[7]

Courts that have suggested the existence of common ground in the *Baldasar* concurrences have adopted either the approach taken by Justice Blackmun or the approach taken by Justice Marshall without persuasively reconciling the two. For example, in *Santillanes* v. *United States Parole Comm'n*, 754 F.2d 887, 889 (10th Cir. 1985), the court of appeals stated that "the holding in *Baldasar* is Justice Blackmun's rationale that an invalid uncounseled conviction cannot be used to enhance a subsequent conviction." But it is incongruous to find the holding of *Baldasar* to be a single Justice's position that takes as its starting point the overt rejection of a precedent of the Court. Justice Blackmun's opinion was predicated on his view that uncounseled misdemeanors punishable by more than six months' imprisonment are invalid; the Court, however, held those convictions valid in *Scott* v. *Illinois*. The "narrowest ground" for decision under *Marks* cannot include a

---

[7] See *United States* v. *Castro-Vega*, 945 F.2d 496, 499-500 (2d Cir. 1991) ("we find that there is no common denominator applicable to this case upon which all of the Justices in the *Baldasar* majority agreed"), cert. denied, 113 S. Ct. 1250 (1993); *United States* v. *Eckford*, 910 F.2d 216, 219 n.8 (5th Cir. 1990) (noting the "absence of an underlying platform of common agreement among the majority justices in *Baldasar*"); *United States* v. *Robles-Sandoval*, 637 F.2d 692, 693 n.1 (9th Cir.) ("The Court in *Baldasar* divided in such a way that no rule can be said to have resulted."), cert. denied, 451 U.S. 941 (1981); *Schindler* v. *Clerk of Circuit Court*, 715 F.2d 341, 345 (7th Cir. 1983) (*Baldasar* "provides little guidance outside of the precise factual context in which it arose"), cert. denied, 465 U.S. 1068 (1984).

premise that squarely conflicts with a binding precedent accepted by the majority of the Court.[8]

On the other hand, in *United States* v. *Williams*, 891 F.2d 212, 214 (9th Cir. 1989), the court of appeals stated that the "consensus" of the *Baldasar* concurrences "is that an uncounseled conviction which is invalid for the purposes of imposing a sentence of imprisonment, though valid in itself for imposing a nonprison sentence, is also invalid for enhancing a sentence of imprisonment." While that statement approximates Justice Marshall's view, it does not accurately capture Justice Blackmun's position. Justice Blackmun contended that an uncounseled misdemeanor conviction is "invalid" for all purposes if the misdemeanor is punishable by more than six months' imprisonment; for that reason alone, he found that Baldasar's prior conviction could not be used to enhance his subsequent sentence. 446 U.S. at 230 (Blackmun, J., concurring). Justice Blackmun did not address the question whether a misdemeanor conviction valid under *Scott* could be used for enhancement purposes.[9]

---

[8] In *Baldasar*, five Justices unequivocally accepted *Scott* v. *Illinois* as binding precedent. 446 U.S. at 224 (Stewart, J., concurring); *id.* at 230 (Powell, J., joined by Chief Justice Burger, Justice White, and then-Justice Rehnquist, dissenting).

[9] Amicus ACLU also makes an unsuccessful effort to derive useful premises on which the five Justices in the *Baldasar* majority agreed. The ACLU first suggests (Br. 7-9) that the majority Justices agreed that when a prior offense is used to enhance a subsequent sentence, the enhancement is "attributable" to the prior offense. That proposition, however, is not helpful; it is simply a restatement of *Burgett* v. *Texas*, *supra* —as the ACLU recognizes (Br. 9). The ACLU next contends (Br. 9) that the Justices in the majority agreed that "an uncounseled conviction that is insufficiently reliable to provide

3. The result of that confusion is widespread disagreement about the scope and application of *Baldasar*. The state courts are badly divided over the reach of *Baldasar*.[10] The situation is no better in the federal system. Many courts of appeals, including the court below, have limited *Baldasar* to its facts, holding that it requires only that "a prior uncounseled misdemeanor conviction may not be used under an enhanced penalty statute to convert a subsequent misdemeanor into a felony with a prison term." *Wilson* v. *Estelle*, 625 F.2d 1158, 1159 n.1 (5th Cir. 1980), cert. denied, 451 U.S. 912 (1981).[11] Other courts

---

a basis for a sentence of incarceration is also insufficiently reliable to form a basis for a subsequent automatic enhancement of a sentence of imprisonment." That formulation, however, does not correspond to Justice Blackmun's position. He contended that a conviction that is *invalid* altogether may not be used for subsequent sentence enhancement; because of his disagreement with the holding of *Scott* v. *Illinois* and his adherence to his dissent in that case, he put Baldasar's conviction into the "invalid" category. Unlike Justice Marshall, he did not argue that a constitutionally *valid* prior conviction has a chameleon-like quality that causes it to become invalid when used for sentence enhancement. To illustrate the difference between Justice Blackmun's view and the ACLU's formulation, consider an uncounseled misdemeanor conviction for an offense punishable by less than six months' imprisonment. Such a conviction would be an insufficient basis for a sentence of incarceration for that offense, and the ACLU's test would therefore find it to be an unreliable basis for subsequent sentence enhancement. Justice Blackmun's test, however, would find such a conviction to be constitutionally valid, and therefore available for sentence enhancement in a later case.

[10] The majority of state courts that have addressed the issue have found that *Baldasar* bars any prior uncounseled misdemeanor conviction from enhancing a term of imprisonment following a second conviction. See, *e.g.*, *Pananen* v. *State*, 711 P.2d 528, 531 (Alaska Ct. App. 1985); *Lovell* v. *State*, 678 S.W.2d 318, 320 (Ark. 1984); *State* v. *Vares*, 801 P.2d 555, 557 (Haw. 1990); *State* v. *Cooper*, 343 N.W.2d 485, 486 (Iowa 1984); *State* v. *Oehm*, 680 P.2d 309, 311-312 (Kan. Ct. App. 1984); *State* v. *Ulibarri*, 632 P.2d 746, 747 (N.M. Ct. App. 1981); *City of Pendleton* v. *Standerfer*, 688 P.2d 68, 70 (Or. 1984); *Sargent* v. *Commonwealth*, 360 S.E.2d 895, 899-901 (Va. Ct. App. 1987); *State* v. *Armstrong*, 332 S.E.2d 837, 841 (W. Va. 1985). Others, however, have said that *Baldasar* bars an enhanced penalty only when it is greater than that authorized in the absence of the prior offense or converts a misdemeanor to a felony. See, *e.g.*, *Moore* v. *State*, 352 S.E.2d 821, 822 (Ga. Ct. App.), cert. denied, 484 U.S. 904 (1987); *State* v. *Laurick*, 575 A.2d 1340, 1347 (N.J. 1990). Still others have found Justice Blackmun's concurrence to limit the reach of *Baldasar* and have held that the decision allows enhancement when the prior uncounseled misdemeanor was a petty offense (punishable by six months' imprisonment or less). See, *e.g.*, *Hlad* v. *State*, 565 So. 2d 762, 764-766 (Fla. Dist. Ct. App. 1990); *State* v. *Orr*, 375 N.W.2d 171, 175-176 (N.D. 1985); *Commonwealth* v. *Thomas*, 507 A.2d 57, 60-61 (Pa. 1986); *State* v. *Novak*, 318 N.W.2d 364, 368-369 (Wis. 1982). And one court has concluded that *Baldasar* establishes no barrier at all to the collateral use of valid, uncounseled misdemeanor convictions. *Sheffield* v. *City of Pass Christian*, 556 So. 2d 1052, 1053 (Miss. 1990).

[11] Accord *United States* v. *Falesbork*, 5 F.3d 715, 718 (4th Cir. 1993) ("the holding of *Baldasar* is limited to prohibiting the elevation of a *misdemeanor to a felony* by reason of an uncounseled conviction that could have resulted in imprisonment for more than six months"); *United States* v. *Burroughs*, 5 F.3d 192, 194 (6th Cir. 1993) (following the decision below; "[t]he only sentencing question decided in *Baldasar* * * * was whether a prior uncounseled misdemeanor conviction could be used to convert a subsequent misdemeanor into a felony"); *United States* v. *Castro-Vega*, 945 F.2d at 501 ("In *Baldasar*, the defendant's prior conviction materially altered the substantive offense * * * by converting it from a misdemeanor to a felony"; declining to apply *Baldasar* where "the court used an uncounseled misdemeanor to determine the appropriate criminal history category for a crime that was already a felony."). Similarly, Justice Marshall's opinion for the Court

have stated in far broader terms that any "imprisonment [in a subsequent case] imposed on the basis of an uncounseled conviction where the defendant did not waive counsel violates the Sixth Amendment under *Baldasar*." *United States* v. *Brady*, 928 F.2d 844, 854 (9th Cir. 1991).[12] *Baldasar* has also spawned non-sentencing disputes. See *Charles* v. *Foltz*, 741 F.2d 834 (6th Cir. 1984) (considering whether uncounseled misdemeanor may be used for impeachment; concluding that it may), cert. denied, 469 U.S. 1193 (1985). And commentators have resorted to intricate analyses of the several opinions in *Baldasar* to determine the decision's meaning.[13]

The Sentencing Commission has specifically determined that certain uncounseled misdemeanor convic-

---

in *United States* v. *Mendoza-Lopez*, 481 U.S. 828 (1987), cited his concurrence in *Baldasar* with the following parenthetical description: "court may not constitutionally use prior uncounseled misdemeanor conviction collaterally to enhance a subsequent misdemeanor to a felony with an increased term of imprisonment." *Mendoza-Lopez*, 481 U.S. at 841 n.18.

[12] See *United States* v. *Norquay*, 987 F.2d 475, 482 (8th Cir. 1993) (*Baldasar* bars an upward departure from the applicable Guidelines range based solely on an uncounseled tribal court misdemeanor conviction); *Santillanes* v. *United States Parole Comm'n*, 754 F.2d at 889-890 (*Baldasar* bars use of conviction to revoke credit for time spent on parole where defendant had not waived counsel in prior state proceeding).

[13] See David S. Rudstein, *The Collateral Use of Uncounseled Misdemeanor Convictions after* Scott *and* Baldasar, 34 U. Fla. L. Rev. 517 (1982); Lily Fu, Note, *High Crimes from Misdemeanors: The Collateral Use of Prior, Uncounseled Misdemeanors Under the Sixth Amendment*, Baldasar *and the Federal Sentencing Guidelines*, 77 Minn. L. Rev. 165, 183, 187-193 (1992) (concluding that *Baldasar*'s ambiguity is "unresolvable" and recommending that *Baldasar* be abandoned).

tions should be included in determining a defendant's criminal history category. The 1989 version of the Sentencing Guidelines indicated that a "sentence resulting in a valid conviction is to be counted in the criminal history score," and that an uncounseled misdemeanor conviction should be excluded only if it "would result in the imposition of a sentence of imprisonment under circumstances that would violate the United States Constitution." Sentencing Guidelines § 4A1.2, Application Note 6 (Nov. 1989). Effective November 1, 1990, the Commission amended Section 4A1.2 by deleting the latter quoted phrase and adding as background commentary the statement that "[p]rior sentences, not otherwise excluded, are to be counted in the criminal history score, including uncounseled misdemeanor sentences where imprisonment was not imposed." United States Sentencing Comm'n, *Guidelines Manual* App. C, amend. 353 (Nov. 1993).[14] In proposing the amendment, the Commission stated that counting all valid uncounseled misdemeanor convictions is consistent with *Baldasar*.[15]

---

[14] The Commission explained (*Guidelines Manual*, *supra*, App. C, amend. 353) that:

> [T]he amendment clarifies the Commission's intent regarding the counting of uncounseled misdemeanor convictions for which counsel constitutionally is not required because the defendant was not imprisoned. Lack of clarity regarding whether these prior sentences are to be counted may result not only in considerable disparity in guideline application, but also in the criminal history score not adequately reflecting the defendant's failure to learn from the application of previous sanctions and his potential for recidivism.

[15] When the Commission published the proposed amendment for notice and comment, it included the following lan-

In light of the persistent divergent interpretations of *Baldasar*, it is safe to say that the enigma of that decision has no solution. At a minimum, the decision cannot be read to resolve the issue presented here: whether it is constitutional to consider a prior uncounseled misdemeanor conviction in establishing the sentencing range for a crime that is already a felony.

There is, of course, an analogy between the "automatic" enhancement of Baldasar's offense from misdemeanor to felony and the "automatic" increase in petitioner's sentencing range under the Guidelines. Pet. Br. 33. That analogy, however, should not be overstated. Unlike in *Baldasar*, the statutory maximum penalty for petitioner's offense was not affected by the presence of a prior misdemeanor conviction. Moreover, again unlike in *Baldasar*, petitioner's prior misdemeanor did not even result in a necessary increase in his Guidelines sentence. Petitioner's uncounseled misdemeanor conviction gave him a fourth criminal history point, which put him in the next sentencing range. Because that range (188-235 months) overlapped with the lower range that he desired (168-210), his actual sentence did not "automatically" increase. And, although it is correct that petitioner could not have received 235 months of imprisonment in the lower Guidelines range, the district

---

guage as background commentary to Guidelines § 4A1.2: "The Commission does not believe the inclusion of sentences resulting from constitutionally valid, uncounseled misdemeanor convictions in the criminal history score is foreclosed by *Baldasar* v. *Illinois*, 446 U.S. 222 (1980)." 55 Fed. Reg. 5741 (1990). As the court below noted, that language was not included in the final version of the amendment, "but that version obviously could not have been adopted without [the Commission's] adherence to the view expressed in the Federal Register notice." J.A. 51 n.3.

court would have been free to consider an upward departure from the lower sentencing range. 18 U.S.C. 3553(b). As the court of appeals observed, "[e]xamination of the record in this case suggests that such a departure might well have been warranted." J.A. 48-49 n.2.

In the end, we do not believe that attempting to distinguish *Baldasar* on its facts from this and other similar cases is a fruitful exercise. Whether or not it is possible to distinguish *Baldasar* in a sound, principled fashion, or to extrapolate a logical rule from *Baldasar* that would bar the consideration of petitioner's misdemeanor conviction in this case, we submit that the Court should not take either step. As we show below, *Baldasar*'s result is unsound on its own terms. This Court's precedents suggest that a conviction that is constitutionally valid under *Scott* may be used in subsequent sentencing proceedings to enhance a defendant's punishment. The Court should therefore take this occasion to adopt that straightforward constitutional rule.

C. The Constitution Does Not Bar Consideration Of A Prior Uncounseled Misdemeanor Conviction In Sentencing For A Subsequent Offense

The principle that a valid, uncounseled misdemeanor conviction can be used to enhance a subsequent sentence of imprisonment flows from three factors: the nature of the sentencing process in this country; the theory of *Scott* v. *Illinois*; and the constitutional logic of this Court's decisions regarding the right to counsel and the proper conduct of sentencing proceedings.

1. As the Court has often noted, a sentencing judge "may appropriately conduct an inquiry broad

in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *United States* v. *Tucker*, 404 U.S. at 446; *United States* v. *Grayson*, 438 U.S. 41, 49-50 (1978); see *Wisconsin* v. *Mitchell*, 113 S. Ct. 2194, 2199 (1993) (sentencing courts typically consider a "wide variety of factors"); 18 U.S.C. 3577 (1982) ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."). Consideration of a defendant's prior encounters with the criminal law that resulted in constitutionally valid convictions fits well within the traditional approach to sentencing in this country. See, *e.g.*, *Parke* v. *Raley*, *supra*.

In *Baldasar*, Justice Marshall contended that "a conviction which is invalid for purposes of imposing a sentence of imprisonment for the offense itself remains invalid for purposes of increasing a term of imprisonment for a subsequent conviction under a repeat-offender statute." *Baldasar*, 446 U.S. at 228 (Marshall, J., concurring). As applied to an uncounseled misdemeanor conviction that is constitutionally valid for sentences short of imprisonment, however, that contention would be tenable only if (1) the subsequent punishment is an enlargement of the sentence for the prior crime, or (2) a sentencing court can lengthen a defendant's term of imprisonment only on the basis of factors that could support imprisonment independently. Neither of those propositions is correct.

The Court has long made clear that recidivism statutes do not impose additional punishment for the prior crime. *Oyler* v. *Boles*, 368 U.S. 448, 451

(1962); *Gryger* v. *Burke*, 334 U.S. 728, 732 (1948); *Graham* v. *West Virginia*, 224 U.S. 616 (1912); *McDonald* v. *Massachusetts*, 180 U.S. 311, 313 (1901); *Moore* v. *Missouri*, 159 U.S. 673, 677-678 (1895). Rather, the enhanced punishment "is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one." *Gryger* v. *Burke*, 334 U.S. at 732. This Court has repeatedly rejected attacks on recidivism statutes based on "contentions that they violate constitutional strictures dealing with double jeopardy, *ex post facto* laws, cruel and unusual punishment, due process, equal protection, and privileges and immunities." *Spencer* v. *Texas*, 385 U.S. at 560. In light of those cases, the use of an uncounseled misdemeanor conviction in sentencing the defendant to an enhanced term of imprisonment for a subsequent crime does not impose punishment for the uncounseled conviction; the enhanced sentence for the repeat offender constitutes punishment imposed for his subsequent conviction.[16]

Nor is it the law that a sentencing court may rely on background information to increase a defendant's term of imprisonment only if that information could have supported imprisonment independently. In *McMillan* v. *Pennsylvania*, 477 U.S. 79, 91-92 (1986), this Court held that due process does not require that facts determined in sentencing proceedings be established beyond a reasonable doubt; to the contrary, as

---

[16] Justice Marshall did not suggest to the contrary; he "agree[d] that the increased prison sentence in this case is not an enlargement of the sentence for the original offense. If it were, this would be a double jeopardy case." *Baldasar*, 446 U.S. at 227 (Marshall, J., concurring).

the Court noted, "[s]entencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all." See Sentencing Guidelines § 6A1.3. Consistent with that principle, a defendant may be sentenced more severely based on his commission of prior crimes with which he was never charged, *Williams* v. *New York*, 337 U.S. 241, 244 (1949) (uncharged burglaries); crimes underlying dismissed counts, see, *e.g.*, *United States* v. *Williams*, 880 F.2d 804 (4th Cir. 1989); and even crimes of which he was acquitted, see, *e.g.*, *United States* v. *Boney*, 977 F.2d 624, 635 (D.C. Cir. 1992). A defendant's refusal to cooperate with a government investigation into crimes related to his offense may trigger heightened punishment. *Roberts* v. *United States*, 445 U.S. 552, 557-558 (1980). And last Term, this Court reaffirmed that a defendant may be sentenced more severely for having committed perjury at his trial, without the necessity for independently indicting and convicting the defendant on that charge. *United States* v. *Dunnigan*, 113 S. Ct. 1111, 1118 (1993); see *United States* v. *Grayson*, *supra*.

Under those cases, the fact that an uncounseled misdemeanor conviction cannot support imprisonment for that offense does not mean that the misdemeanor conviction may not be used to enhance a term of imprisonment for the defendant's subsequent crime. If that reasoning were correct, prior conduct found by a preponderance of the evidence at sentencing could not be used for enhancement purposes, *McMillan*, *supra*, since the defendant obviously could not be imprisoned on such a showing alone, *In re Winship*, 397 U.S. 358, 364 (1970). Such reasoning, however, runs counter to a basic feature of this

country's sentencing systems: less exacting standards are applied to evidence offered to determine the appropriate punishment than to evidence offered to establish guilt. Because courts can constitutionally impose additional imprisonment as a direct consequence of findings that are not in themselves sufficient to justify conviction, it is no argument against the use of uncounseled misdemeanor convictions in subsequent sentencing proceedings to say that imprisonment "was imposed [in the subsequent proceeding] as a direct consequence of [an] uncounseled conviction" that could not itself support imprisonment. *Baldasar*, 446 U.S. at 227 (Marshall, J., concurring).

2. There is no greater force to the contention that uncounseled misdemeanor convictions for which the defendant was not imprisoned are too unreliable to be used in subsequent sentencing proceedings. That claim is irreconcilable with *Scott* v. *Illinois*, *supra*. By upholding the constitutional validity of uncounseled misdemeanor convictions where imprisonment is not imposed, *Scott* necessarily adopted the view that such convictions are reliable enough to establish the defendant's guilt beyond a reasonable doubt and to support the imposition of criminal sanctions. If such uncounseled convictions are sufficiently reliable determinations of guilt to support fines and collateral civil consequences, as well as the stigma that attaches to any finding of guilt, they are also reliable enough indicators of past criminal conduct to support use in sentencing for subsequent crimes.[17]

---

[17] As an alternative argument, petitioner urges the Court to overrule *Scott* and to hold that the Sixth Amendment re-

The premise of recidivist sentencing is that a defendant's danger to society and the need for additional deterrence are increased if he has engaged in criminal conduct repeatedly. That premise does not justify enhancing a sentence based on a conviction that is itself constitutionally void, and unreliable, because the defendant lacked counsel. *United States* v. *Tucker*, 404 U.S. at 449; *Burgett* v. *Texas*, 389 U.S. at 115; see also *Lewis* v. *United States*, 445 U.S. 55, 67 (1980); *Linkletter* v. *Walker*, 381 U.S. 618, 639 n.20 (1965). But the rationale of those cases does not apply to *valid* uncounseled convictions, which are not inherently unreliable.

In *Burgett*, the Court stated that "[t]o permit a conviction obtained in violation of *Gideon* v. *Wainwright* to be used against a person either to support guilt or enhance punishment for another offense is to erode the principle of that case. Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right." *Burgett* v. *Texas*, 389 U.S. at 115; see *Tucker*, 404 U.S. at 449. That statement assumes the existence of a *Gideon* violation. Here, however, there is no such violation: the government is neither exploiting an initial constitutional wrong nor exacerbating it

---

quires counsel or a valid waiver of counsel whenever imprisonment is authorized for a misdemeanor. Br. 36-43. Petitioner did not make that claim below or in his petition for certiorari; the petition did not even cite *Scott*, let alone ask that it be overruled. Accordingly, that contention is not properly before the Court. *Parke* v. *Raley*, 113 S. Ct. at 523; *Yee* v. *City of Escondido*, 112 S. Ct. 1522 (1992); *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, No. 92-1123 (Nov. 30, 1993) (per curiam).

through the further use of a suspect conviction. To the contrary, there is no "defect in the prior conviction" for the government to misuse.

3. It follows that the use, for sentencing purposes, of a misdemeanor conviction that is valid under *Scott* should not be deemed to violate any constitutional principle. The Sixth Amendment is not violated, as it is impossible to locate a proceeding in which any Sixth Amendment violation occurs. Here, for example, *Scott* establishes that petitioner, who was not sentenced to imprisonment in his Georgia misdemeanor case, did not suffer a Sixth Amendment violation at that time. Nor is it reasonable to find a Sixth Amendment violation in that case retrospectively because another jurisdiction (the United States) later relied on the Georgia conviction in enhancing petitioner's federal sentence. And petitioner cannot contend that he was denied a right to counsel in the subsequent federal proceedings; his Sixth Amendment rights were safeguarded in this case, as he was represented by counsel at every critical stage. Thus, there is *no* proceeding in which a Sixth Amendment violation can plausibly be found.

The subsequent use of a conviction that is valid under *Scott* also accords with due process principles. It would be surprising to find that the Due Process Clause prevents the use of a valid but uncounseled prior conviction in subsequent sentencing proceedings if the Sixth Amendment does not. "The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment." *Strickland* v. *Washington*, 466 U.S. 668, 684-685 (1984). "Beyond the specific guarantees enumerated in the Bill of Rights, the Due

Process Clause has limited operation." *Dowling* v. *United States*, 493 U.S. 342, 352 (1990); *Medina* v. *California*, 112 S. Ct. 2572, 2576 (1992); *Estelle* v. *McGuire*, 112 S. Ct. 475, 484 (1991); see also *Parke* v. *Raley*, 113 S. Ct. at 525.

In light of the wide scope traditionally given to a sentencing court in reviewing an offender's background, *Williams*, 337 U.S. at 245-251, and the long history of recidivist statutes, *Parke* v. *Raley*, 113 S. Ct. at 521, there is no settled practice that casts doubt on the use of constitutionally valid convictions to enhance a defendant's sentence for a subsequent conviction. Nor is such consideration unfair in practice. A sentencing proceeding may violate principles of fairness if the judge relies on inaccurate information. In *Townsend* v. *Burke*, 334 U.S. 736 (1948), the Court found a due process violation when the defendant was "sentenced on the basis of assumptions concerning his criminal record which were materially untrue," id. at 741, because the trial judge believed that the defendant had been convicted of charges of which the defendant had actually been acquitted, *id.* at 740. Under *Townsend*, when a sentence's "foundation" is based on "extensively and materially false" information, it violates due process.[18] *Id.* at 741.

But consideration of a prior conviction that is valid under *Scott* cannot be equated with consideration of a report about a prior conviction that turns out to

[18] Not every factual error in sentencing amounts to a constitutional violation, however. "Fair prosecutors and conscientious judges sometimes are misinformed or draw inferences from conflicting evidence with which we would not agree. But even an erroneous judgment, based on a scrupulous and diligent search for truth, may be due process of law." *Townsend* v. *Burke*, 334 U.S. at 741.

be entirely false, or with consideration of a conviction that is later overturned because the defendant lacked counsel. See *United States* v. *Tucker*, 404 U.S. at 447 (sentencing judge considered "misinformation of [a] constitutional magnitude" in the form of convictions that were later ruled invalid under *Gideon*). A judge would not be misled by considering a prior sentence that is validly entered. Sentencing authorities may reasonably find that the commission of a crime after the entry of a prior, valid conviction is a reliable indicator of the defendant's propensity for recividism.

There is, therefore, no persuasive constitutional rationale for barring the use of a prior misdemeanor conviction that is valid under *Scott* to enhance a subsequent sentence. To adopt such a rule would be to create a constitutional anomaly—a "hybrid" conviction, *Baldasar*, 446 U.S. at 232 (Powell, J., dissenting), that is valid for purposes of its own punishment short of imprisonment, but that lapses into unconstitutionality (or infects a later sentence) when used in a recidivist proceeding. As Justice Powell predicted, *id.* at 235, such a holding would either compel the States to offer appointed counsel in all misdemeanor cases (with the burden and expense that this Court sought to avoid in *Scott*) or undercut the important policy of punishing repeat offenders more seriously because of their prior records.

* * * * *

While it is possible to draw a distinction between *Baldasar* and this case, the interests of predictability, clarity, and consistency in the law suggest that *Baldasar* be reconsidered. *Baldasar* reflects an incorrect application of basic sentencing doctrine, it has been

a source of confusion in the courts, see notes 10-12, *supra*, and it undermines a central premise used in sentencing repeat offenders. Accordingly, to remove the destabilizing influence of that case on the law, *Baldasar* should be overruled. See *United States* v. *Dixon*, 113 S. Ct. 2849, 2863-2864 (1993); *Payne* v. *Tennessee*, 111 S. Ct. 2597 (1991); *Thornburgh* v. *Abbott*, 490 U.S. 401, 413-414 (1989).

II. PETITIONER DID NOT CARRY HIS BURDEN TO ESTABLISH THAT HE DID NOT KNOWINGLY AND INTELLIGENTLY WAIVE THE ASSISTANCE OF COUNSEL

If this Court were to conclude that the use of a prior uncounseled misdemeanor conviction to enhance a subsequent sentence is improper under *Baldasar*, petitioner still would not be entitled to relief in this case. A defendant may relinquish the right to counsel through a valid waiver. *Faretta* v. *California*, 422 U.S. 806 (1975). While petitioner may have lacked counsel in his Georgia DUI case, he failed to carry the burden of establishing that he did not "knowingly and intelligently" forgo counsel. *Id.* at 835; *Johnson* v. *Zerbst*, 304 U.S. 458, 464-465 (1938). In the absence of such a showing, there is no constitutional bar to consideration of that misdemeanor conviction in sentencing.

1. The Court has indicated that on direct review a waiver of the right to counsel cannot be presumed "from a silent record"; there must be a showing in the record, or evidence that establishes, "that an accused was offered counsel but intelligently and understandingly rejected the offer." *Carney* v. *Cochran*, 369 U.S. 506, 516 (1962). See also *Michigan* v. *Jackson*, 475 U.S. 625, 633 (1986) (on direct appeal;

State "has the burden of establishing a valid waiver" of Sixth Amendment rights). The rule is otherwise, however, in a collateral attack. In *Johnson* v. *Zerbst*, 304 U.S. at 468-469 (footnote omitted), the Court stated:

> It must be remembered, however, that a judgment cannot be lightly set aside by collateral attack, even on *habeas corpus*. When collaterally attacked, the judgment of a court carries with it a presumption of regularity. Where a defendant, without counsel, acquiesces in a trial resulting in his conviction and later seeks release by the extraordinary remedy of *habeas corpus*, the burden of proof rests upon him to establish that he did not competently and intelligently waive his constitutional right to assistance of counsel. If in a *habeas corpus* hearing, he does meet this burden and convinces the court by a preponderance of evidence that he neither had counsel nor properly waived his constitutional right to counsel, it is the duty of the court to grant the writ.

The Court reaffirmed that principle in *Moore* v. *Michigan*, 355 U.S. 155, 161 (1957). The defendant in *Moore* waived counsel and pleaded guilty in 1938. In 1950, he filed a motion for a new trial alleging that he was denied the assistance of counsel. *Id.* at 156. Noting the standard it had adopted in *Johnson* v. *Zerbst* in a collateral attack in a federal case, the Court held that "the rule of *Johnson* v. *Zerbst* applies in this case and * * * petitioner had the burden of showing, by a preponderance of the evidence, that he did not intelligently and understandingly waive his right to counsel." *Moore*, 355 U.S. at 161-162. See also *Kitchens* v. *Smith*, 401 U.S. 847, 848 (1971) (per curiam) (to establish a denial of the right to

appointed counsel on habeas review, defendant has the burden to establish indigence).

The allocation of the burden of proof to the defendant in collateral proceedings applies to attacks on prior convictions used for subsequent sentencing purposes. In *Parke* v. *Raley*, 113 S. Ct. at 523, the Court cited *Johnson* v. *Zerbst* in holding that "the 'presumption of regularity' that attaches to final judgments" justifies placing the burden of proof on the defendant in a challenge to the use of a prior conviction in sentencing, "even when the question is waiver of constitutional rights."

Under those cases, when petitioner claimed that his uncounseled conviction could not be used for sentence enhancement, he had "the burden to establish that his waiver of counsel was not knowing and intelligent." *United States* v. *Lee*, 995 F.2d 887, 889 (9th Cir. 1993) (per curiam); *Cuppett* v. *Duckworth*, No. 89-1896, 1993 WL 403925, at *5 (7th Cir. Oct. 8, 1993) (en banc) (in a recidivist proceeding, the defendant "has the burden of establishing that his waiver of counsel in his [prior] conviction was not intelligently made, thus overcoming the presumption of the constitutionality of state judicial proceedings"); *United States* v. *Unger*, 915 F.2d 759, 761 (1st Cir. 1990).[19]

[19] The government so argued in its sentencing memorandum. C.A. Joint Appendix 92 n.1 ("[i]f the defendant contends * * * that this criminal history point should not be counted because to do so would be unconstitutional (which in turn hinges on the factual premise that the conviction was obtained without counsel) he should bear the burden of establishing those facts. * * * *See also, United States* v. *Unger*, 915 F.2d 759, 761 (1st Cir. 1990)."). The cited page of *Unger* states that when the government has proved the fact of a prior conviction that it seeks to include in the defendant's criminal history score, "the burden then shifts to the defendant" to establish "(1) that he was entitled to representation at the [prior proceeding], (2) that he lacked counsel at that juncture and had not waived his rights in such regard, and (3) that, on the facts established, the law prohibited using the adjudication to boost his criminal history score." 915 F.2d at 761.

When no such showing is made, the absence of counsel may be presumed to be attributable to the defendant's decision to relinquish the opportunity for representation.[20]

2. Petitioner's DUI misdemeanor conviction was entered in municipal court in Georgia. According to the presentence report in this case, petitioner told the probation officer that "he had contacted an attorney and had been informed by that attorney that he did

[20] *Burgett* v. *Texas*, *supra*, is not inconsistent with that rule. In *Burgett*, 389 U.S. at 114-115, the Court declined to presume "a waiver of counsel from a silent record." As the Court explained in *Parke* v. *Raley*, 113 S. Ct. at 524, *Burgett*'s statement was made in the context of convictions that were entered before the right to counsel was recognized in *Gideon*. Once a right to counsel has been recognized, as Georgia has done for petitioner's DUI offense, see notes 21-22, *infra*, a presumption of regularity surrounds the judicial proceedings in which that right is protected. Cf. *Parke*, 113 S. Ct. at 524 (presuming compliance with "the well-established *Boykin* requirements" for accepting guilty pleas). Moreover, the "silent record" in *Burgett* was the actual record made in the prior conviction. In this case, the record of the prior conviction was not introduced; rather, as is typically the case, the presentence report summarized the charge and its disposition. See Probation and Pretrial Services Division, Administrative Office of the United States Courts, *The Presentence Investigation Report*, Pub. No. 107, Ch. II, Part B (rev. Mar. 1992). Thus, "[t]his is not a case in which an extant transcript is suspiciously 'silent' on the question whether the defendant waived constitutional rights." *Parke*, 113 S. Ct. at 523-524.

not need to be represented at the hearing, since he would be pleading nolo contendere." C.A. Joint Appendix 37. The record in this case contains no information indicating that petitioner did not "knowingly and intelligently" waive the opportunity to be represented by counsel, and Georgia law supports the inference that he did.

Although States are not constitutionally required to provide counsel in a misdemeanor case when imprisonment is not imposed, Georgia does not limit the appointment of counsel in that manner. Under the *Guidelines for Local Indigent Defense Programs*, 246 Ga. 837 (1980), adopted by the Georgia Supreme Court, the right to counsel applies to any offense for which imprisonment is authorized.[21] By statute, Georgia courts are required to provide representation for indigent persons in criminal cases.[22] Those provisions have been interpreted as requiring "that counsel be appointed for indigent defendants, whether charged with a felony *or* misdemeanor, where such person could be imprisoned under the State law of Georgia if found guilty." *Lowrance* v. *State*, 359 S.E.2d 196, 197 (Ga. Ct. App. 1987) (opinion of Sognier, J.).

If petitioner had been unable to retain counsel in his DUI case because of indigence, Georgia law would

[21] Section 1.1 of the Georgia Supreme Court's Guidelines states: "Counsel shall be provided to all persons eligible as herein defined whenever such a person is accused of a felony by indictment, warrant or warrantless arrest or a misdemeanor for which such a person could be imprisoned under the State law of Georgia." 246 Ga. at 837.

[22] "All courts of this state having jurisdiction of proceedings of a criminal nature shall, by rule of court, provide for the representation of indigent persons in criminal proceedings in such court." Ga. Code Ann. § 17-12-4(a) (Michie 1990).

have required that he be offered appointed counsel.[23] And even for a defendant who is indigent, Georgia law requires that if he decides to proceed without representation, the court should obtain a valid waiver of counsel. See *Clarke* v. *Zant*, 275 S.E.2d 49 (Ga. 1981) ("We therefore hold that in future cases, the record should reflect a finding on the part of the trial court that the defendant has validly chosen to proceed pro se. The record should also show that this choice was made after the defendant was made aware of his right to counsel and the dangers of proceeding without counsel."); *Singleton* v. *State*, 337 S.E.2d 350 (Ga. Ct. App. 1985); *Callahan* v. *State*, 333 S.E.2d 179 (Ga. Ct. App. 1985). Those background requirements of state law give rise to a presumption that petitioner's waiver was constitutionally valid.[24]

[23] It is doubtful that petitioner could have made a showing of indigence. According to the presentence report, petitioner indicated that "from 1970 until his 1990 arrest, he was self-employed as a contractor and real estate speculator," and that his "yearly net profit from his construction business was from $30,000 to $40,000." C.A. Joint Appendix 40. Petitioner did not object to that statement, although he filed detailed objections and corrections to other parts of the presentence report. *Id.* at 60-69. Cf. *Moore* v. *Jarvis*, 885 F.2d 1565, 1573 (11th Cir. 1989) (in order to state a claim under *Baldasar*, a defendant must establish that he was indigent at the time of the prior offense or that some misconduct by the State prevented the defendant from retaining counsel).

[24] It may be otherwise when a State, unlike Georgia, does not extend the right to counsel farther than is required by *Scott*. In a State in which appointed counsel is required neither by the Constitution nor by state law, the state courts may not engage in any colloquy designed to establish that a defendant who is proceeding without counsel is doing so knowingly and intelligently. And, when a defendant can establish that

What evidence there is suggests that petitioner did waive counsel. The most probative evidence, of course, is petitioner's statement to the probation officer that he consulted a lawyer, who told him that he did not need counsel in light of his intention to enter a nolo contendere plea. In addition, in 1983, the same year as petitioner's DUI conviction,[25] petitioner was indicted for a drug offense in federal district court in Florida. He was represented by counsel in that case. C.A. Joint Appendix 36. Petitioner's exposure to the criminal justice system, and his contemporaneous representation by counsel in another case, supports the inference that he knowingly determined to forgo representation in the Georgia DUI case. See *Parke* v. *Raley*, 113 S. Ct. at 527 (Court has "previously treated evidence of a defendant's prior experience with the criminal justice system as relevant to the question whether he knowingly waived constitutional rights"); *Marshall* v. *Lonberger*, 459 U.S. 422, 437 (1983); *Gryger* v. *Burke*, 334 U.S. at 730.

Conceivably, petitioner could have overcome the presumption of regularity surrounding his uncounseled conviction and established that, for example, state law with respect to the right to counsel was not followed in the municipal court in Canton, Georgia, and that he did not knowingly and intelligently waive counsel in his DUI case. Simply alleging that a violation occurred would not be enough, see *Cuppett* v. *Duckworth*, 1993 WL 403925, at *7 ("self-serving statements by a defendant that his conviction was constitutionally infirm are insufficient to overcome the presumption of regularity accorded state convictions"), but petitioner did not even make the allegation. Nor did he introduce the actual record of the DUI conviction in support of such a claim.

The district court purported to assign the burden of proof to petitioner, J.A. 9, but in effect the court relieved petitioner of his burden of proof. After observing that "[t]he proof is unclear as to whether [petitioner] may have validly waived his right to counsel" in his DUI case, J.A. 9-10, the district court found that petitioner had not waived that right because of the legal rule that "[s]uch a waiver must be intelligently and understandingly made, and cannot be presumed from a silent record."[26] J.A. 10. The application of that presumption was erroneous. Because petitioner had the burden to show the absence of a valid waiver and because there was no evidence to support that conclusion, the district court should have ruled against petitioner on that issue. Accordingly, even if *Baldasar* remains good law and is applicable here, petitioner's uncounseled misdemeanor conviction was properly considered in the sentencing process.

---

he was indigent at the time of the prior conviction and was not offered appointed counsel, it could be argued that any purported waiver of counsel would be suspect for that reason. Those considerations, however, are not applicable to the misdemeanor conviction at issue in this case.

[25] Petitioner's DUI violation was charged on April 25, 1983, and disposed of on May 2, 1983. C.A. Joint Appendix 37.

[26] Likewise, the court of appeals, while expressing doubts about the factual accuracy of that conclusion, affirmed it "as a legal matter." J.A. 47 n.1.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

MICHAEL R. DREEBEN
Assistant to the Solicitor General

THOMAS E. BOOTH
Attorney

DECEMBER 1993

☆ U. S. GOVERNMENT PRINTING OFFICE: 1993 501157 88062